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No. 15-274

In The

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, Commissioner,
Texas Department of State Health Services, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE INDIANA TECH LAW SCHOOL AMICUS PROJECT IN SUPPORT OF PETITIONERS

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MOTION OF INDIANA TECH LAW SCHOOL AMICUS PROJECT TO FILE AMICUS BRIEF OUT OF TIME IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3(a), the Indiana Tech Law School Amicus Project moves for leave to file an amicus brief out of time in support of the Petitioners. Counsel for both parties have consented to the filing of the accompanying brief, Petitioners via telephone and Respondents via email. Three copies of the amicus brief have been sent via U.S. Mail, postage prepaid, to all parties of record. An electronic copy of the amicus brief was also sent to the Court on January 12, 2016.

On November 13, 2015, the Court granted certiorari in this matter, and on December 28, 2015, counsel for Petitioners filed their merits brief. Thus, under Rule 37.3(a), the deadline to file amicus briefs in support of Petitioners was January 4, 2016. Unfortunately, due to the holiday break, counsel for the Amicus Project was vacationing out-of-state in December and unable to fully review, edit, and submit the brief by the January 4 deadline.

Additionally, the Amicus Project respectfully submits that the accompanying brief will be of significant value to the Court and assist the Court in arriving at a reasoned decision in this matter. In the brief, the Amicus Project addresses issues not covered by other amici or the parties, and proposes a workable solution that will guide lower courts, legislatures, and litigants in future cases. Accordingly, Indiana Tech Law School Amicus Project respectfully requests

leave to file the accompanying amicus brief out of time.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Indiana Tech Law School Amicus Project ("Amicus Project") strives to assist the Court in arriving at decisions that enable citizens to exercise and enforce well-settled constitutional rights, and that prevent states from enacting laws with the intent to directly or indirectly eviscerate such rights.[1] The Amicus Project respectfully submits that this case presents the Court with an opportunity to clarify the scope of the abortion right and to hold, as the Court has in other contexts, that States may not enact laws with the intent to prevent citizens from accessing safe abortion services.

SUMMARY OF ARGUMENT

"The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values." *Roe v. Wade*, 410 U.S. 113, 219 (1973) (Douglas, J., concurring).

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[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its law school, or its counsel made a monetary contribution to this brief's preparation or submission. The views expressed herein are solely those of the Indiana Tech Law School Amicus Project and do not necessarily represent the view of Indiana Tech Law School or the Indiana Institute of Technology.

The purpose underlying the challenged provisions of Texas House Bill No. 2 (H.B. 2) has little to do with protecting women's health.[2] Rather, the Texas legislature enacted H.B. 2 to effectively overrule *Roe v. Wade* and eliminate abortions in Texas. As former Governor Rick Perry declared when the bill provisions were being debated, "[m]y goal, and the goal of many of those joining me here today, is to make abortion, at any stage, a thing of the past." Press Release, Governor Rick Perry, Tex., *Governor Perry Announces Initiative to Protect Life* (Dec. 11, 2012), http://perma.cc/CWN2-KLDD. That goal, however well-intentioned, is precisely why the challenged provisions of H.B. 2 cannot withstand constitutional scrutiny.

To begin with, states have an obligation to enforce, not eviscerate, fundamental constitutional rights. As this Court has held, when federal constitutional rights are at issue, states "must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Speiser v. Randall*, 357 U.S. 513, 521 (1958). As a corollary, states may not seek to accomplish through the legislature – here effectively overruling *Roe* – what they would not be able to accomplish through

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[2] H.B. 2 requires, among other things that "a physician performing an abortion to have admitting privileges at a hospital within thirty miles of the location where the abortion is performed." *Whole Woman's Health v. Cole*, 790 F.3d 563, 576 (5th Cir. 2015). In addition, H.B. 2 requires that abortion facilities "satisfy the standards set for ambulatory surgical centers." Both provisions are challenged in this matter.

the courts. *See, e.g.*, *Bailey v. Alabama*, 219 U.S. 219 (1911) (state laws are invalid if they operate to transgress a substantive constitutional right "in their natural operation"). In other words, "[w]hat the state may not do directly it may not do indirectly." *Id.* Yet, that is precisely what Respondents, in enacting the challenged provisions of H.B. 2, strive to accomplish.

Indeed, Texas would probably achieve these objectives if the challenged provisions of H.B. 2 were upheld. First, the admitting privileges and ambulatory care requirements would result in the closure of several abortion clinics, thus rendering abortions inaccessible – and more dangerous – for a large number of Texas women. *See Planned Parenthood of Wisconsin v. Schimel*, 806 F.3d 908, 913 (7th Cir. 2015) (noting that "some [hospitals] may be reluctant to grant admitting privileges to abortion doctors because there is great hostility to abortion in Wisconsin") (brackets added). As the district court found, "[b]efore the enactment of House Bill 2, there were more than 40 licensed abortion facilities providing abortion services throughout Texas," and "[t]hat number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014). In fact, if the challenged provisions of H.B. 2 are upheld, the number of abortion clinics in Texas will likely be reduced to ten or fewer, forcing some women to travel hundreds of miles to access an abortion provider. *See Whole Woman's*

Health v. Cole, 790 F.3d 563, 598 (5th Cir. 2015) (noting that "the nearest abortion facility is 550 miles away").

The mass closure of abortion clinics in Texas would make abortions more dangerous for many Texas women. As the Seventh Circuit held in *Schimel*, the number of abortion clinics that remained open would be so overburdened with patients that "[s]ome women would have to forgo first-trimester abortions and instead get second-trimester ones, which are more expensive and present greater health risks." *Schimel*, 806 F.3d at 918.

What's more, the need to regulate the safety of abortion procedures is virtually non-existent. *See Schimel*, 806 F.3d at 913 (holding that "any benefit of admitting privileges in terms of continuity of care is incrementally small") (internal citations omitted). The vast majority of complications from abortion – ninety-six percent to be exact – are minor, and serious complications from abortion occur in less than one quarter of one percent of cases. *See, e.g.*, Danielle Haynes, *Abortion Complication Rates Are 'Very Low,' Study Says*, available at: http://www.upi.com/Health_News/2014/12/09/Abortion-complication-rates-are-very-low-study-says/3591418165114/; Tracy A. Weitz, *et al.*, *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. Public Health 454, 457-458 (2013). In fact, the rate of "complications requiring hospital admissions

is *one-twentieth of 1 percent*." *Id.* at 457-458, table 2 (emphasis added).

Given these facts, it is quite telling that Texas does not require physicians who perform outpatient surgeries with substantially greater rates of complications to obtain hospital admitting privileges. For example, Texas does not require physicians who perform tooth extractions, tonsillectomies, and colonoscopies, which have higher complication rates, to obtain admitting privileges. *See id.*; *see also* Cynthia W. Ko, *et al.*, *Serious Complications Within 30 Days of Screening and Surveillance Colonoscopy Are Uncommon*, 8 Clinical Gastroenterology & Hepatology 166, 171-172 (2010) (finding that the complication rate for colonoscopies (minor and major) is four times that of abortion). The reason for this is simple: Texas is no more concerned with protecting women than it is concerned with protecting children who get their wisdom teeth removed or adults who get screened for colon cancer. *See Schimel*, 806 F.3d at 921 ("[o]pponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure – abortion – that rarely produces a medical emergency"). The objective here is obvious: to severely restrict access to abortion clinics and, as then Governor Rick Perry stated, "make abortion, at any stage, a thing of the past." (Press Release, *supra*, http://perma.cc/CWN2-KLDD.

For these reasons, as well as those set forth *infra*, the Court should hold that, although the purpose underlying the challenged provisions of H.B. 2 is facially benign, it was enacted "with an evil eye and

an unequal hand," *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886). H.B. 2 is as irrational in operation as its interest in protecting women's health is specious in fact. Accordingly, the Fifth Circuit's decision should be reversed, and the challenged provisions of H.B. 2 should meet their constitutional demise.

ARGUMENT

I. The Right to a Pre-Viability Abortion is Rooted in Healthcare, Not Merely Choice.

A woman's right to terminate a pregnancy prior to viability is a healthcare-related privacy right. *See Roe v. Wade*, 410 U.S. 113 (1973). Put differently, the abortion right does not consist merely of the right to *choose* to have an abortion. It implies, indeed requires, that women have safe and meaningful access to abortion services.

A. The *Roe* Court Based the Abortion Right on Privacy-Related Healthcare.

In *Roe*, the Court identified a constitutional right to pre-viability abortion, which has been reaffirmed by this Court on numerous occasions. 410 U.S. at 153 (holding that the "right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *see also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 846 (reaffirming "a recognition of the right of the woman to choose to have an abortion before viability

and to obtain it without undue interference from the State").

Importantly, the right to have a pre-viability abortion, although sometimes referred to as a "right to choose," is firmly rooted in *privacy-related* healthcare, particularly the sensitive relationship between a woman and her physician.[3] *See Roe*, 410 U.S. at 166 ("the abortion decision in all its aspects is inherently, and primarily, a medical decision" and is to be made in consultation with a "responsible physician"). In *Roe*, the Court stated:

> The decision [*Roe*] vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, *the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic*

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[3] Much criticism has been rightly levelled against the early healthcare framing of the abortion right as it reflected and reinforced the prevalent paternalistic model of healthcare at the time. Under the Court's early analysis, women's constitutional right of choice was subordinated to the discretion and judgment of their medical providers. However, while this characterization of the paternalistic doctor-patient relationship has been replaced by a modern patient-centered healthcare model, what can be distilled from these early cases is the Court's recognition that the abortion right is grounded in healthcare, not merely choice. As a consequence, the Court necessarily concluded that in protecting the abortion right, it was critical to protect access to abortion-related healthcare and the privacy of the consumer-provider relationship.

> *responsibility for it must rest with the physician. Roe*, 410 U.S. at 165-166 (emphasis added) (brackets added).

As the Court held in *City of Akron v. Akron Center for Reproductive Health*, "because abortion is a medical procedure the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'" 462 U.S. 416, 427 (1983) (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)); *see also Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 61 (1976) ("the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician").

The Court's jurisprudence demonstrates that "'[a]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy.'" *Beal v. Doe*, 432 U.S. 438, 449 (1977) (Brennan, J., dissenting) (quoting *Roe v. Norton*, 408 F. Supp. 660, 663 n. 3 (Conn. 1975)). As Justice Blackmun noted in his concurring opinion in *Casey*, "just as the Due Process Clause protects the deeply personal decision of the individual to *refuse* medical treatment, it also must protect the deeply personal decision to *obtain* medical treatment, including a woman's decision to terminate a pregnancy." 505 U.S. at 927, n. 3 (Blackmun, J., concurring).

There is good reason for linking the abortion right to personal privacy *and* healthcare, not merely framing it as an extension of rights relating to procreation, marriage and childrearing, or an abstract right of choice. *See Roe*, 410 U.S. at 213 (Douglas, J., concurring) (stating that abortion involves "the right to care for one's health and person and to seek out a physician of one's own choice"). Abortion is not merely a deeply personal decision, but one that necessarily requires access to safe abortion-related healthcare services to effectuate the liberty interest that underlies the abortion decision. As Justice Douglas explained in *Roe*, the term "liberty" in the Fourteenth Amendment included, "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk or stroll or loaf." *Id.*

As set forth below, the challenged provisions of H.B. 2 strike at the very heart of what makes the abortion right meaningful because they have the effect of severely limiting access to abortion providers, thus rendering the abortion right all but meaningless for many Texas women.

B. The Right to Have An Abortion Implies the Right to Safely Access Abortion Services.

The cases that followed in *Roe*'s wake reaffirm the inextricable link between the right to choose to have a pre-viability abortion and the necessity of having *access* to abortion-related healthcare. After *Roe*, the Court invalidated laws that were justified under the guise of protecting women's health, but in operation, imperiled the lives of women by preventing *access* to safe abortion services. *See City of Akron*, 462 U.S. at 438 (striking down provisions of an Akron ordinance that required all second-trimester abortions to be performed in a hospital). In *City of Akron*, the Court stated as follows:

> [B]y preventing the performance of abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion. *Id.*[4]

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[4] The Court has emphasized the importance of the relationship between a woman and doctor as central to the abortion right. In *Danforth*, the Court invalidated a law attempting to define the point of viability, stating as follows:

> [I]t may vary with each pregnancy, and is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time

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Additionally, the Court held that the hospitalization requirement threatened the health of women seeking abortions, as "a second-trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk [that] may significantly limit a woman's ability to obtain an abortion." *Id.* at 435.

Thus, *Roe* and its progeny firmly established a right to pre-viability abortions and emphasized that abortion was a healthcare-related privacy right. By implication, to exercise this right, women must have reasonable *access* to *safe* abortion services. Consequently, restricting access to abortion services is tantamount to restricting the abortion right itself.

II. States Cannot Enact Laws that Eviscerate Constitutional Rights.

States have an obligation to protect, not imperil, fundamental constitutional rights. In *Bailey v. Alabama*, the Court held that state laws are invalid if they operate to transgress a substantive constitutional right "in their natural operation." 219 U.S. at 245. In *Bailey*, the Court stated as follows:

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when viability is achieved and determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician. 428 U.S. at 64-54.

> It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. *Id.* at 239

Stated simply, "[w]hat the state may not do directly it may not do indirectly." *Id.* at 244.

Importantly, whether a state procedural or evidentiary rule "transgresses a constitutional command is judged by whether 'the natural operation of the statute' produces the proscribed result, not whether the statute or its enactors betray such an intention." *Id.*; *see also In re Hill*, 715 F.3d 284, 304-305 (11th Cir. 2013) (Barkett, J., dissenting). Here, by making access to abortion providers next to impossible for some women, particularly those below the federal poverty line, the state is commanding a result that will all but eliminate the abortion right.

For these and other reasons, when federal constitutional rights are at issue, the State "must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights."[5]

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[5] The Court has recognized in other contexts that there must be an enabling mechanism by which citizens can meaningfully exercise constitutional rights and protections. *See, e.g.*, *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (holding that the right to counsel implies the right to *effective* assistance of counsel, and that, "in giving meaning to the requirement, however, we must

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Speiser, 357 U.S. at 521. Moreover, "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Id.* at 520-521. The Court reaffirmed this principle in *Atkins v. Virginia*, where it categorically prohibited the execution of mentally disabled offenders and commanded states to "develop[ ] appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U.S. 304, 317 (2002).

Here, Texas seeks through H.B. 2 to eviscerate, not enforce, a protected constitutional right. The admitting privileges and other requirements would result in the closure of a number of abortion clinics, make it difficult, if not impossible, for many Texas women to receive abortions, and endanger, rather than protect, women's health.[6] In *Schimel*, the Seventh Circuit noted that Wisconsin's admitting privileges requirement would result in the closure of abortion clinics:

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take its *purpose* – to ensure a fair trial – as the guide"); *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (to ensure the a defendant is tried by a fair and impartial jury, the jurors must be comprised of a cross-section of the community).

[6] In other contexts, the Court has invalidated laws that, although facially benign, target specific practices or individuals for the purpose of eviscerating fundamental constitutional rights. *See, e.g.*, *Church of Lukhumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) ("[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality"); *Guinn v. U.S.*, 238 U.S. 347 (1915) (invalidating a law that conditioned the right to vote upon passing a literacy test).

> [T]he chances of their [abortion providers] being granted admitting privileges are "slim to none." The reason is that almost all of their practice consists of performing abortions and they therefore lack recent experience in performing inpatient medical procedures for which hospitals would grant admitting privileges. Nor is any of their clinical practice peer reviewed, which hospitals also make a condition of granting admitting privileges. 806 F.3d at 916.

As the Seventh Circuit held in *Schimel*, this is true *even if* an abortion clinic employs doctors who currently have admitting privileges.

> [W]ere the statute to be upheld, Planned Parenthood's clinics could also face having to close or significantly reduce the abortions they perform, within a few years, despite currently having doctors with admitting privileges. Hospitals generally require that a doctor, to maintain his admitting privileges, be responsible for admitting a specified minimum number of patients annually. Because of the very low rate of complications from abortions that require hospitalization, the required quotas may be difficult to meet. *Id.* at 917.

As stated above, perhaps the best evidence that H.B. 2 is little more than an attempt to eviscerate *Roe* is the fact that Texas does not require *any* other physician who performs outpatient surgeries to

obtain admitting privileges. In *Schimel*, the Seventh Circuit held as follows:

> No other procedure performed outside a hospital, even one as invasive as a surgical abortion, is required by Wisconsin law to be performed by doctors who have admitting privileges at hospitals within a specified radius of where the procedure is performed. And that is the case even for procedures performed when the patient is under general anesthesia, and even though more than a quarter of all surgical operations in the United States are now performed outside of hospitals. *Id.* at 914.

In other words, just like the Wisconsin legislature in *Schimel*, Texas "appears to be indifferent to complications of any other outpatient procedures, even when they are far more likely to produce complications than abortions are." *Id.* At bottom, if Texas had its way, the abortion right would be transformed into a right that existed merely in the abstract. *See* Press Release, Governor Rick Perry, Tex., *Governor Perry Announces Initiative to Protect Life* (Dec. 11, 2012), http://perma.cc/CWN2-KLDD (stating that one of his goals was "to make abortion, at every stage, a thing of the past"). In essence, under H.B. 2, women would have a right to *choose*, but not to *have* an abortion.

Furthermore, the link between obtaining hospital admitting privileges and protecting a woman's health

is all but non-existent. In *Schimel*, the Seventh Circuit stated:

> The abortion doctor [does not] need admitting privileges at a hospital in order to call an ambulance to take his patient to the nearest hospital, or to communicate with the treating doctor at the hospital – neither of which he did. As the district judge found, in the case of abortion "any benefit of admitting privileges in terms of continuity of care is incrementally small." *Schimel*, 806 F.3d at 913 [brackets added].

What's worse, by severely limiting access to most abortion providers, H.B. 2 makes abortions *less*, not more, safe, and improperly interferes with the physician-patient relationship. *See Schimel*, 806 F.3d at 916 (explaining that the statute in question "would have substantially curtailed the availability of abortion in Wisconsin, *without conferring an offsetting benefit (or indeed any benefit) on women's health*") (emphasis added). For example, existing abortion providers would be faced with an influx of patients, many of whom the providers would not be able to accommodate. As a result, "[s]ome women would have to forgo first-trimester abortions and instead get second-trimester ones, which are more expensive and present greater health risks." *Id.* at 918.

In addition, some women "would be unable to obtain any abortion, because the delay [in obtaining an abortion] would push them past the 18.6-weeks-LMP ("last menstrual period," which is likely to

precede conception by a couple of weeks) deadline for the Planned Parenthood clinics' willingness to perform abortions." *Id.* (brackets added). As a practical matter, this would mean that "[w]omen seeking lawful abortions that late in their pregnancy, either because of the waiting list or because they hadn't realized their need for an abortion sooner, would be unable to obtain abortions." *Id.* Texas seeks precisely the same result and, for the same reason, the challenged provisions of H.B. 2 are unconstitutional.

Moreover, it is of no consequence that women in Texas, some of whom would be forced to travel 550 miles to the nearest abortion clinic, may access abortion services in *other states*. *See, e.g.*, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (internal citation omitted). What *does* matter is that women in Texas who fall below the federal poverty line will see their abortion right vanish.

Finally, the requirement that abortion providers obtain admitting privileges to hospitals *within thirty miles* of where the abortion is provided does nothing to help a woman who travels 100 miles to obtain an abortion. In the unlikely event that a woman suffers complications, she is certainly more likely to travel to the hospital around the corner rather than venturing seventy miles to a hospital that would offer the same level of care. That is precisely the point. The challenged provisions of H.B. 2 do not further any

legitimate interest, and certainly not the interest in protecting women's health.

The challenged provisions do not merely place a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992), it erects a nearly impenetrable – and patently unconstitutional – barrier. *See, e.g.*, *Planned Parenthood of Wisconsin, Inc., et al. v. Schimel*, No. 15-1736 http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D11-23/C:15-1736:J:Posner:aut:T:fnOp:N:1661222:S:0 (decided Nov. 20, 2015); *Jackson's Women's Health Organization v. Currier*, 760 F.3d 448, 459 (5th Cir. 2014) (holding that plaintiff "*demonstrated a substantial likelihood of proving that* [the requirement] has the effect of placing a substantial obstacle in the path of a woman seeking an abortion in Mississippi, and is therefore unconstitutional as applied to the plaintiffs in this case"); *Planned Parenthood of Wisconsin, Inc., et al. v. Von Hollen*, 94 F. Supp. 3d 949 (W.D. Wis. 2015) (invalidating a Wisconsin law requiring physicians performing abortions to have hospital admitting privileges within thirty miles of the clinic where an abortion is performed).

For these reasons, "[u]ntil and unless *Roe v. Wade* is overruled by the Supreme Court," a statute "likely to restrict access to abortion with no offsetting medical benefit cannot be held to be within the enacting state's constitutional authority." *Schimel*, *supra*. Nowhere is this principle more applicable than where

a state strives to achieve indirectly [the overruling of *Roe*] what this Court – and the Constitution – prevents it from doing directly. *See Bailey*, 219 U.S. at 244. Ultimately, there can be no doubt that H.B. 2 was enacted "with an evil eye and an unequal hand," and with a disregard for, not a careful consideration of, a woman's health. *Yick Wo*, 118 U.S. at 373-374. For these reasons, *and to protect women's health*, the challenged provisions of H.B. 2 should be invalidated.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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